

UNITED STATES COURT OF APPEALS February 15, 2013

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

HERMAN TRACY CLARK,

Plaintiff - Appellant,

v.

MICHAEL T. OAKLEY; OKLAHOMA
DEPARTMENT OF CORRECTIONS,

Defendants - Appellees.

No. 13-6024
(D.C. No. 5:11-CV-00946-C)

ORDER

Before **KELLY, O'BRIEN**, and **MATHESON**, Circuit Judges.

Pro se plaintiff Herman Clark appealed the district court's order and final judgment dismissing his civil rights case. The district court denied Mr. Clark's motion seeking to reopen the time to appeal. Afterward Mr. Clark filed a notice of appeal, but cited only the final order and judgment as the subject of the appeal and not the order denying the motion to reopen. This court entered an order to show cause as to why the appeal should not be dismissed as untimely filed. Mr. Clark filed a response. Upon consideration, we have concluded that we are without jurisdiction to consider this appeal.

"A timely notice of appeal is both mandatory and jurisdictional." *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1239 (10th Cir. 2006) (quotation omitted). In a civil case, a notice of appeal must be filed within 30 days after the judgment or order

appealed from is entered. Fed. R. App. P. 4(a)(1)(A). Although Mr. Clark is proceeding *pro se*, he must comply with the same procedural requirements that govern other litigants. *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007); *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994).


The district court's order dismissing Mr. Clark's case and the final judgment were entered on August 21, 2012. To be timely, the notice of appeal should have been filed by September 20, 2012. *See* Fed. R. App. P. 4(a)(1)(A). Mr. Clark unsuccessfully sought to reopen the time to appeal in the district court. *See id.* 4(a)(6). He then filed a notice of appeal from the final order and judgment – but not the order denying leave to reopen the time appeal – on January 31, 2013.

This court directed Mr. Clark to show cause as to why the appeal should not be dismissed as untimely. In response, Mr. Clark alleged that he did not receive the district court's order dismissing his case until January 10, 2013, one day after he called the district court and advised that court he had not received the final decision by mail. This argument might be persuasive under different circumstances, but Mr. Clark has not appealed the district court's order denying his motion to reopen the time to appeal. By the plaintiff's own designation, *see* Fed. R. App. P. 3(c)(1)(B), the only matters at issue in this appeal are the final order and judgment entered on August 21, 2012. Because his appeal of the final order and judgment are untimely and the district court denied his motion to reopen the time to appeal these matters, we are without jurisdiction to consider his appeal of them. The United States Supreme Court has made clear that federal courts “ha[ve] no authority to create equitable exceptions to jurisdictional requirements.”

Bowles v. Russell, 551 U.S. 205, 214 (2007). As a result, this untimely appeal cannot be saved.

APPEAL DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in cursive script that reads "Lara Smith".

by: Lara Smith
Counsel to the Clerk